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January 23, 2004

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By Hand

Ms. Mary L. Cottrell
Secretary
Department of Telecommunications & Energy
One South Station
Boston, MA 02110

Re: D.T.E. 03-83
Petition of USGen New England, Inc.

Dear Ms. Cottrell:

On behalf of USGen New England, Inc. ("USGenNE"), I enclose for filing in the above-referenced docket one original and one copy of the Initial Brief of USGen New England, Inc.

Kindly date stamp the enclosed copy of this letter, and return same to our messenger.

Thank you for your attention to this matter.

Sincerely,

Mary Beth Gentleman

MBG:jrd
Enclosures

cc: Selma Urman, Hearing Officer (9 copies)
Diedre Matthews, Director, Siting Division (1 copy)
William Febiger, Technical Director, Siting Division (1 copy)
Jolette Westbrook, General Counsel, Siting Board (1 copy)
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Service List

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 03-83

**Petition for Zoning Exemption
Pursuant to Mass. Gen. L. c. 40A, § 3 for
Salem Harbor Station's 310 CMR 7.29
Emissions Control Project**

INITIAL BRIEF OF USGEN NEW ENGLAND, INC.

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**Boston, Massachusetts
January 23, 2004**

**COMMONWEALTH OF MASSACHUSETTS
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I. INTRODUCTION

Last June, after months of negotiation with representatives of the Romney Administration, the City of Salem and numerous public interest and environmental organizations, USGen New England, Inc. ("USGenNE" or "Company"), the owner of Salem Harbor Station ("Salem Harbor"), entered into an Administrative Consent Order ("ACO").¹ The ACO represents a balancing of competing needs and interests with respect to the present and future operation of Salem Harbor: requirements for further emission reductions at Salem Harbor, the Independent System Operator's ("ISO") need for Salem Harbor to continue operating, and the financial constraints of USGenNE. These divergent interests were ultimately reconciled under the terms of the ACO.

One of the many commitments made under the ACO by USGenNE was to endeavor to obtain all necessary permits and approvals to construct its Emissions Control Plan ("ECP") Project as expeditiously as possible.² In particular, USGenNE committed to seek an exemption from local zoning requirements from the Department of Telecommunications and Energy

¹ Administrative Consent Order # ACO-NE-03-7001 pertaining to compliance with air emission regulations at 310 CMR 7.29.

² The exact timing of construction is subject to receipt of all required governmental authorizations, the arrangement of funding for such construction and, potentially, the approval of the U.S. Bankruptcy Court for the District of Maryland (Greenbelt Division), in which the bankruptcy proceeding of USGenNE is now pending. (Exh. USGenNE-1 at 1, fn. 1).

("DTE" or "Department") under Mass. Gen. L. c. 40A, § 3. However, USGenNE also agreed to ask that the DTE defer consideration of USGenNE's request for an exemption from the local Site Plan Review process. Accordingly, USGenNE submitted its ECP Project for review by the City of Salem's Planning Board. Last month, USGenNE received from that Board a unanimous approval, including a series of conditions designed to minimize the impact of the Project on Salem Harbor's neighbors and on the City as a whole.

To honor its commitment in the ACO to endeavor to expedite the zoning approval process, USGenNE is seeking in this proceeding a comprehensive exemption from all other aspects of the Salem Zoning Ordinance. As a result of USGenNE's use of this innovative, hybrid approach to seeking an exemption under Mass. Gen. L. c. 40A, § 3, the City of Salem has reviewed and modified this Project to address concerns at the municipal level. The Department can exercise its zoning exemption authority assured that the needs of Salem Harbor's neighbors and of the City as a whole will be protected, while the reliability needs of the North Shore and Greater Boston area continue to be met.

II. ARGUMENT

A. USGENNE IS A PUBLIC SERVICE CORPORATION WITH RESPECT TO ITS OWNERSHIP AND OPERATION OF SALEM HARBOR.

The term "public service corporation" ("PSC") is undefined in the General Laws, and the Supreme Judicial Court ("SJC") has avoided strict construction of its meaning. *See Planning Board of Braintree v. Dep't of Public Utilities*, 420 Mass. 22, 26 (1995) (characterizing a "public service corporation" as a "term of art"); *see also Save the Bay, Inc. v. Dep't of Public Utilities*, 366 Mass. at 667 (1975) (noting that "whether a corporation qualifies as a [PSC] is not so strictly and precisely defined" as suggested by petitioner). Rather, in *Save the Bay* the SJC listed the following "pertinent considerations" for determining PSC status: (i) "whether the corporation is

organized pursuant to an appropriate franchise from the state to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business;" (ii) "whether the corporation is subject to the requisite degree of governmental control and regulation;" and (iii) "the nature of the public benefit to be derived from the service provided." See *Save the Bay*, 366 Mass. at 680; see also *Commonwealth Electric Company*, D.T.E. 03-7, at 3-4, (2003) ("ComElec"); *Tennessee Gas Pipeline Company*, D.T.E. 01-57, at 3-4, (2002) ("Tennessee Gas").

The Department has applied *Save the Bay*'s "pertinent considerations" as "a flexible set of criteria which allow the Department to respond to changes in the environment in which the industries it regulates operate and still provide for the welfare of the public." *Berkshire Power Development, Inc.*, D.P.U. 96-104, at 30 (1997) ("*Berkshire Power*"); see also *Dispatch Communications of New England d/b/a Nextel Communications, Inc.*, D.P.U./D.T.E. 95-59-B/95-80/95-112/96-113, at 6 (1998) ("*Nextel*"). Accordingly, the term "public service corporation" "encompass[es] a variety of unspecified circumstances." See *Nextel* at 6 (citing *Planning Bd. of Braintree*, 420 Mass. at 25-28). *Save the Bay*'s "pertinent considerations," therefore, should be interpreted "not as a test, but rather as guidance to ensure that the intent of G.L. c. 40A, § 3 will be realized..." See *Berkshire Power* at 30.

1. **USGenNE, as the Owner of Salem Harbor, Provides a Public Necessity.**
 - a. **USGenNE, as the owner of Salem Harbor, meets a demonstrated public need.**

To satisfy the requirements of Mass. Gen. L. c. 40A, § 3, USGenNE must first demonstrate that it operates pursuant to an appropriate franchise to provide a necessity or convenience to the general public. See *Save the Bay*, 366 Mass. at 680. The SJC has interpreted this standard broadly to include a variety of companies that share one common characteristic --

they meet a demonstrated public need. *See id.* at 681. A PSC, for example, need not be organized under Mass. Gen. L. c. 164.³ *See id.* (upholding Department's grant of PSC status to a liquefied natural gas ("LNG") company not incorporated under Mass. Gen. L. c. 164). Neither must a PSC be assigned to serve a specific geographic area or service territory. *See id.* A PSC also need not have eminent domain authority as is common for certain traditional utilities.⁴ *See Truro v. Department of Public Utilities*, 365 Mass. 407, 408 (1974); *Wenham v. Department of Public Utilities*, 333 Mass. 15, 16-17 (1955). Finally, a PSC need not be a corporation at all. *Planning Board of Braintree*, 420 Mass. at 27 (upholding Department's grant of PSC status to a statutorily created municipal light department); *Truro*, 365 Mass. at 410 ("...service involved in this case could lawfully be provided by an individual or a partnership rather than a corporation.").

Save the Bay is particularly instructive on this point. In that case, the court upheld the Department's designation of an LNG company (the "LNGCo") as a PSC, which, like USGenNE, was not organized under Mass. Gen. L. c. 164 ("Chapter 164") and did not operate under a franchise. *See Save the Bay*, 366 Mass. 667, 684-85. The Court considered it critical that the LNGCo met "a public need for an increased supply of natural gas in Massachusetts and New England," as evidenced by the fact that the two gas pipelines supplying the area were unable to

³ USGenNE is a Delaware corporation, qualified to do business in Massachusetts. It is not organized under Mass. Gen. L. c. 164.

⁴ However, as a wholesale generation company, USGenNE can exercise the power of eminent domain, with the approval of the Department, with respect to facilities subject to the jurisdiction of the Energy Facilities Siting Board. *See* Mass. Gen. L. c. 164, § 69R.

meet current demand.⁵ *Id.* at 680. In so deciding, the Court relied on the judgment of the Department regarding need:

The Department specifically found a public need for an increased supply of natural gas in Massachusetts and New England. It noted that the two pipeline companies supplying the New England area have not been able to meet the increased demands of the utilities. As the proposed facility would be equipped to liquefy and store natural gas collected in summer months for transportation and sale in the peak demand periods of the winter, the Department found that the facility would be providing a service sufficient to qualify it as a 'public service corporation.'

Save the Bay, 366 Mass. at 681, n. 13; see also *Yankee Celltel*, D.P.U. 84-72, at 3 (1984) (DPU concurred with finding of the Federal Communications Commission that there was "an immediate public need for cellular radio" and, therefore, granted the company the authority to serve customers in the Commonwealth).

The Department has also avoided a literal application of the "franchise" requirement with respect to companies seeking PSC status in "industries that have evolved, particular[ly] those industries that have become more competitive." See *Nextel* at 19 n.13 (citing *Berkshire Power* at 31). With respect to the electric industry in particular, the Department has noted that the enactment of PURPA initiated a restructuring towards independent generation, transmission, and distribution markets, and away from local franchising. See *Berkshire Power* at 31. This trend persuaded the Department to conclude that "the pertinent consideration of 'an appropriate franchise' in *Save the Bay* [is] to be of limited value in the electric industry as it has evolved since *Save the Bay* was issued." *Id.* Rather, when assessing the PSC status of companies in the electric power industry, the Department has focused less on the "franchise" element of the *Save*

⁵ The *Save the Bay* court also noted that the operative service area in the "need" analysis was not only the local area in which the applicant resided, but rather the entire territory served by the applicant. *Save the Bay*, 366 Mass. 667, 685.

the Bay test, and more on whether the service offered by the entity can be characterized as “reasonably necessary for the convenience or welfare of the general public.” See *Berkshire Power* at 28-9 (because “the term ‘public service corporations’ has no statutory definition,” the Department “look[s] to the rest of the statute which states that a PSC provides a product or service that is ‘reasonably necessary for the convenience or welfare of the public.’”)

USGenNE, in its capacity as the owner of Salem Harbor, is a PSC because it meets a demonstrated public need that is reasonably necessary for the convenience or welfare of the public. See *Save the Bay*, 366 Mass. at 681; *Berkshire Power* at 31. As an initial matter, USGenNE’s operation of Salem Harbor is in response to a directive from ISO, the entity authorized by the Federal Energy Regulatory Commission (“FERC”) to administer New England’s bulk power system with the oversight of NEPOOL.⁶ ISO has explicitly demonstrated the public need for USGenNE’s Salem Harbor units 1-4 (the “Salem Harbor Units”). (Exh. USGenNE-1-13, at 1; Transcript of Public Evidentiary Hearing of January 13, 2004 (hereinafter “Tr.”) at 16-17). Specifically, in response to USGenNE’s April 25, 2003 application to ISO under Rule 18.4 of the Restated NEPOOL Agreement (“RNA”)(the “18.4 Application”), ISO determined that continued operation of the Salem Harbor Units is “required for NEPOOL System reliability . . .” (the “18.4 Determination”). *Id.* The 18.4 Determination was based on ISO’s July 9, 2003 *Final Report, Reliability Assessment of Proposed Retirement of Mystic 4-6, New Boston 1, and Salem Harbor 1-4*, which found that the Salem Harbor Units “cannot retire until sufficient transmission improvements are made in the North Shore and Boston Import areas

⁶ On July 25, 1997, FERC conditionally authorized the establishment of ISO and the transfer to ISO of control over New England’s bulk power system. See *New England Power Pool*, 79 FERC ¶ 61,374 (1997), *reh’g denied*, 85 FERC ¶ 61,242 (1998). On August 8, 2003, the NEPOOL Participants Committee filed with the FERC an amendment to extend until December 31, 2004, the agreement with ISO. See *New England Power Pool*, FERC Docket No. ER03-1181-000 (Notice of Filing, August 14, 2003).

such that the import capacity can support load with adequate operating reserve.” (Exh. USGenNE-1-14, at 19)(the “*Final Report*”). Based on the *Final Report* and its assessment of the impact of the Salem Harbor Unit closures on the NEPOOL System, ISO concluded that such closures would have “a significant adverse effect on the reliability of the NEPOOL System” as a whole and on the North Shore load area and Boston in particular. (Exh. USGenNE-1-13, at 1; Exh. USGenNE-1-14, at 19). As a result, continued operation of Salem Harbor is necessary to prevent “a significant adverse effect on the reliability of the NEPOOL System.” (Exh. USGenNE-1-13, at 1).

The *Final Report*’s findings were subsequently confirmed in ISO’s Regional Transmission Expansion Plan Technical Report for 2003 (the “RTEP03”). The RTEP is a report issued annually by ISO, and is a result of its yearlong regional planning effort that examines system needs throughout New England. (Exh. USGenNE-3, at 1; Tr. 21).⁷ RTEP03 confirmed that the Salem Harbor Units are needed to meet the electric power needs of the North Shore area and the Boston import area currently and into the future. (Exh. USGenNE-4, at 27-28, 99; Tr. at 17).

Further demonstrating a public need for the Salem Harbor Units, ISO approved the retirement of the Mystic Station Units 4-6 (the “Mystic Units”) on December 8, 2003, based in part on the assumption that the Salem Harbor Units would remain operational as long as necessary to ensure the reliability of the NEPOOL System. (Exh. USGenNE-PCS, at 2; Tr. at 14). This approval reversed ISO’s original rejection of Exelon Mystic LLC’s application to

⁷ Part of this effort includes meetings of the Transmission Expansion Advisory Committee “TEAC”). (Tr. 21). The Committee meetings are open to all interested parties in the region, including members of NEPOOL, the transmission owners, regulatory personnel, and interested members of the public. *See id.* At those meetings, ISO describes the studies it has undertaken, proposes changes to the system, and seeks comments from the attending parties. *See id.* At the conclusion of this process, and after its findings and recommendations are reviewed by all parties attending the TEAC meetings, ISO issues a final report that must be approved by ISO’s Board of Directors. (Tr. 22).

retire the Mystic Units, and assumed that the continued operation of the Salem Harbor Units was sufficient to guarantee the reliability of service in the NEPOOL System. (Exh. USGenNE-PCS-2 and 3). ISO's decision to allow the retirement of the Mystic Units -- assuming that the Salem Harbor Units remain operational -- highlights even more clearly the extent to which the continued operation of the Salem Harbor Units is needed for system reliability in the Boston Import and North Shore areas of NEPOOL.

In effect, the 18.4 Determination confirms that the Salem Harbor Units provide a demonstrated necessity or convenience for power to the general public of Boston and the North Shore. *See Save the Bay*, 366 Mass. at 680-681; *Berkshire Power* at 31; (Exh. USGenNE-1-13). Both the *Final Report* and the more recent RTEP03 support this conclusion. (Exh. USGenNE-1-14; Exh. USGenNE-4, at 27-28, 99; Tr. at 17).

ISO's determination is equivalent to the Department's determination with respect to the LNGCo in *Save the Bay* regarding the demonstrated public need for the LNGCo's natural gas in that case. *See Save the Bay*, 366 Mass. at 680-681. The fact that it is ISO that has made this determination with respect to the Salem Harbor Units, and not a government agency such as the Department or FERC, is a distinction without a difference. The Department itself has expressly observed that, under the current configuration of the bulk power system serving New England, it is ISO, subject to review by the FERC, that has the initial responsibility for determining whether the public convenience and necessity requires the operation of particular generation facilities and, if so, the terms under which those services are to be provided. *See Inquiry into Application of USGenNE*, D.T.E. 03-51, Letter to Gordon Van Welie, President and CEO, ISO New England, Inc., from DTE Commissioners, July 14, 2003, at 4 ("ISO-NE will determine whether implementation of the Company's 'plan will have a significant adverse effect upon the reliability

or operating characteristics of its system...”(citing RNA § 18.4)). In addition, FERC has recognized ISO’s authority in this matter. *See New England Power Pool*, 101 FERC ¶ 61,344, p. 12 (2002) (“ISO-NE has the authority to negotiate such agreements as are needed for system reliability . . . [and] these agreements will be filed with the Commission . . .”); *Devon Power*, 103 FERC ¶ 61,082 (2003) (FERC review of agreement proposed after ISO determination that continued operation of units in question was required for reliability). Therefore, for all practical purposes, because of FERC’s integral role in the implementation of ISO’s directives, the Department should accord such directives the same consideration as directives made by FERC itself.

In sum, in its capacity as administrator of the bulk power system in New England -- as sanctioned by FERC -- ISO has expressly determined that all of the Salem Harbor Units are required for NEPOOL System reliability until vital transmission improvements in the North Shore and Boston Import areas are completed. (Exh. USGenNE-1-13, at 1). It is difficult to imagine a more express determination of public convenience and necessity.

b. USGenNE, as the owner of Salem Harbor, provides a public necessity not otherwise available through the ordinary channels of private business.

As the owner of Salem Harbor, USGenNE also satisfies the second part of *Save the Bay*’s PSC criteria, since the public necessity USGenNE provides is not otherwise available through the ordinary channels of private business. *See Save the Bay*, 366 Mass. at 680-681. As an initial matter, the Department has recognized that electric power producers inherently satisfy this criterion. *See Berkshire Power* at 32. In so concluding, the Department has reasoned that furnishing electricity is necessarily subject to heavy governmental control:

While changes are being made in the electric power industry, and the generation segment of the industry is moving toward competition, that does not change the fact that electricity can only

be furnished to customers through a transmission and distribution system that remains comprehensively regulated. Thus, the provision of electricity over such an integrated and regulated system is not comparable to the furnishing of a product through the ordinary channels of business.

Berkshire Power at 32; see also *Nextel* at 21 (finding that effective and uninterrupted wireless communications delivered through an integrated and regulated network cannot be effectively established through the ordinary channels of private business).

In light of its obligation under the ISO Determination (Exh. USGenNE-1- 13, at 1), USGenNE, in order to qualify as a PSC, need not even rely on *Berkshire Power*'s conclusion that electric power is a service that is inherently unavailable through the ordinary channels of private business. See *Berkshire Power* at 32; *Nextel* at 20. Rather, USGenNE meets this standard simply because it is not free to discontinue its operations at Salem Harbor. As the Department itself explained in *Nextel*: "Private businesses generally do not operate under an obligation, and therefore, the 'ordinary channels of private business' would necessarily require the *absence* of any type of obligation to serve." *Id.* (emphasis supplied). Although USGenNE's obligations are not identical to those imposed on a traditionally regulated "electric company" or a "gas company," USGenNE is subject to an obligation to continue operating the Salem Harbor Units under the terms of the ACO and the RNA. *Id.* (Exh. USGenNE-1-13, at 1). Salem Harbor's obligation stems from ISO's denial of the 18.4 Application, and the resulting requirement that USGenNE continue to operate the Salem Harbor Units in order to maintain reliability in the Boston Import Area.⁸ *Id.* ISO's more recent decision approving the retirement of the Mystic Units renders USGenNE's obligation to continue operating the Salem Harbor Units even more indisputable. (Exh. USGenNE-PCS, at 2; Tr. at 14). Given USGenNE's obligation to

⁸ The Boston Import Area includes the North Shore load area.

continuing operating, consistent with the terms of the RNA, there is no question that the Salem Harbor Units provide a necessity that cannot be furnished through the ordinary channels of private business. *See Berkshire Power* at 32; *Nextel* at 21.

Finally, it is instructive that, in applying to ISO for permission to close Salem Harbor, USGenNE was unable to exercise an option typically available to private businesses, namely, the right to make its own operational decisions based on purely economic considerations. In denying USGenNE's 18.4 Application, ISO made clear that, unlike a private business, USGenNE has a duty to a third party to maintain operations, even in the absence of a rational economic basis. (Exh. USGenNE-1-13, at 1). This requirement eliminated any notion USGenNE may have had of being a "private business" operating through "ordinary channels." *See Nextel* at 20 (commercial mobile radio service providers have obligation to serve because they are obligated to make their services available to the public upon reasonable request).

2. USGenNE, as the Owner of Salem Harbor, is Subject to a Substantial Degree of Government Control.

The Department has noted that "[n]either the statute nor Court decisions have identified what level of governmental control and regulation is required" to satisfy the "governmental control criterion" of *Save the Bay*. *Berkshire Power* at 34. The necessary control can be satisfied by governmental authority imposed at either or both the federal and state level. *See, e.g., Save the Bay*, 366 Mass. at 682-683 (PSC within the regulatory jurisdiction of both the Federal Power Commission and the Department); *Nextel* at 27 (PSC within the regulatory jurisdiction of the Federal Communications Commission). Given the diversity in the type of control envisioned by the standard, a petitioner need not meet any particular "minimum requirements," nor demonstrate any specific type of regulatory oversight, in demonstrating the "requisite degree of governmental regulation and control." *See Berkshire Power* at 34; *Nextel* at

27-28. Rather, the Department looks to “key aspects of an entity’s operations which, if regulated, might be appropriate to consider in determining whether the entity possesses the characteristics of a PSC.” *Nextel* at 28. To this end, the Department has found that regulation of a corporation’s “entry, siting, rates and tariffs” were relevant to this inquiry. *Id.*; *see also Berkshire Power* at 34. As explained below, USGenNE is subject to significant regulatory oversight at the state and federal level that satisfies this second prong of the *Save the Bay* test.

First, USGenNE is a wholesale generation company as defined in Mass. Gen. L. c. 164, § 1. D.P.U. 98-20 *Petition of USGen New England, Inc. Requesting an Advisory Ruling by the Department of Telecommunications and Energy, pursuant to 220 C.M.R. § 2.08(1)*, April 8, 1998 (“*Advisory Ruling*”). As the Department recognized in the Advisory Ruling, “the price and terms of wholesale generation transactions are regulated by [FERC].” *Advisory Ruling* at 7, n.11.⁹

Second, USGenNE is a “public utility” under the terms of the Federal Power Act. 16 U.S.C. § 824(e); *New England Power Company*, 82 FERC ¶ 61,179, p. 13 (1998) (“upon acceptance of its rate schedules, USGenNE will become a public utility and subject to FERC jurisdiction”). While USGenNE has been determined to be an exempt wholesale generator, *USGen New England*, 84 FERC ¶ 62,126 (1998), and has been granted authority to charge market-based rates, *New England Power Company*, 82 FERC ¶ 61,179, its rates are nonetheless subject to the exclusive oversight of FERC. *See Order Seeking Comments On Proposed Revisions To Market-Based Rate Tariffs And Authorizations*, 103 FERC ¶ 61,349 (2003); 16 U.S.C. § 824m (limitation on rates of exempt wholesale generators). Further, USGenNE is a

⁹ For that reason, the Massachusetts Legislature limited the Department’s jurisdiction over a wholesale generation company to those requirements expressly provided in Mass. Gen. L. c. 164, §§ 1, 1A(e), 69R, 96, and 125A, or where a wholesale generation company applies for siting approval under §§ 69G to 69Q. *See Advisory Ruling* at 7.

member of NEPOOL, which falls under FERC's jurisdiction. The Department has previously found that membership in NEPOOL is indicative of regulatory control over a corporation. *See Berkshire Power* at 35; *Braintree Elec. Light Department*, D.P.U. 90-263, at 38 (1991). Clearly, given the extent to which USGenNE operates under both federal and state "regulation and control," it satisfies the second "pertinent consideration" of *Save the Bay*.

3. **The Construction of the Project Will Provide a Substantial Public Benefit.**

In considering the third criterion for PSC status in *Save the Bay*, the Department has assessed the public value of the service provided by the entity petitioning as a PSC. *See Berkshire Power* at 35-36 ("The nature of the public benefit that is derived from the generation of electricity is not dependent on the vertical integration of the electric industry, or on the corporate structure of the generator; rather, it stems from the needs of the electricity consumer"); *Nextel* at 34 (Department considered commercial mobile radio service to institutional providers and residential recipients of medical services during outages of the public telephone system of public value). Specifically, the Department will recognize that a company seeking PSC status provides a substantial public benefit where the company satisfies a demonstrated public need or discharges a public duty. *See Save the Bay*, 366 Mass. at 681-683; *Mezitt v. Department of Public Utilities*, 354 Mass. 692, 693 (1968) (LNG company's construction of a plant for liquefying natural gas meets a public need); *Planning Board of Braintree*, 420 Mass at 27-28 (municipal and private utilities have a duty to serve the public and must have the tools available to perform their duty, including Mass. Gen. L. c. 40A, § 3); *Berkshire Power* at 35; *Nextel* at 34. The Department has suggested that companies in the electric power industry, in particular, inherently provide a public benefit in satisfaction of this third prong of the *Save the Bay* standard:

The generation of electricity [] is a public necessity that is critical to public health and safety. . . . Because of the unique role that electricity plays in the economy of the Commonwealth and the lives of its citizens, the Department must be able to ensure that critical infrastructure for the generation, transmission, and distribution of electricity can be sited whenever and wherever it is reasonably necessary to the public convenience and welfare. Based on the nature of the public benefit to be derived from the service provided, the Department finds that the removal of obstacles to the provision of such a public benefit is consistent with the intent of G.L. c. 40A, § 3.

Berkshire Power at 35-36.

Salem Harbor's continued operation to support reliability is a clear public benefit, and provides tangible public value. *Berkshire Power* at 35-36. First, in assessing the impact of the retirement of the Salem Harbor Units, ISO made clear that the existing public need for reliability in the NEPOOL System could only be satisfied by the continued operation of the Salem Harbor Units. (Exh. USGenNE-1-13, at 1). Indeed, ISO recognized the Salem Harbor Units' importance to NEPOOL reliability on the North Shore as particularly critical, since "the retirement of any [Salem Harbor] unit will immediately create significant deficiencies that worsen over time." (Exh. USGenNE-1-14, at 17). The continued operation of the Salem Harbor Units is also crucial for the Boston Import Area, including Downtown Boston, both for ensuring generation resource adequacy, which determines the Loss of Load Expectation ("LOLE"), and in guaranteeing sufficient operating reserve capacity. (Exh. USGenNE-4, at 27-28, 99; Tr. at 17-20). As ISO explained, "the retirement of Salem Harbor 1-4 also makes the LOLE unacceptable for 2003 and 2008 and beyond. . . . [and] retiring Salem Harbor would cause an operating reserve deficiency starting in 2006 and the deficiency would gradually increase over time." (Exh. USGenNE-1-14, at 13-14). Finally, ISO's recent decision allowing the retirement of the Mystic Units only intensifies the need for Salem Harbor to remain operational. (Exh. USGenNE-PCS, at Att. 3). Indeed, ISO permitted the retirement of the Mystic Units only under the presumption

that the Salem Harbor Units would remain fully operational. (Exh. USGenNE-PCS- 2; Tr. at 14). In sum, Salem Harbor's continuing operation satisfies the public need for a reliable supply of electricity for customers in the Boston Import Area.

B. A COMPREHENSIVE EXEMPTION FROM THE ZONING ORDINANCE OF THE CITY OF SALEM IS NECESSARY.

The Department will allow comprehensive zoning relief under Mass. Gen. L. c. 40A, § 3 “where numerous individual exemptions are required or where the issuance of a comprehensive exemption could avoid substantial public harm by serving to prevent delay in the construction and operation of the proposed use.” *Commonwealth Electric Company*, D.T.E. 03-7, at 33, (2003)(“*ComElec*”); see also *Tennessee Gas Pipeline Company*, D.T.E. 01-57, at 11 (2002)(“*Tennessee Gas*”); *Massachusetts Electric Company*, D.T.E. 01-77, at 30-31 (2002) (“*MassElectric*”). A comprehensive zoning exemption is appropriate where, in the case of numerous required exemptions, the proposed construction is time-sensitive or of critical importance to the petitioner’s serving its customers in a satisfactory manner pending the completion of the proposed project. See *Tennessee Gas* at 11. Finally, the Department will allow comprehensive exemptions warranted by public convenience and necessity, and where it is critical to the public interest that construction of the proposed substation begin without needless delay. See *Tennessee Gas* at 12; *MassElectric* at 31; *ComElec* at 34. In USGenNE’s case, comprehensive zoning relief is necessary for the reasons discussed below.

1. Numerous Exemptions are Required for this Complex Project.

The Project merits comprehensive zoning relief because, in order to satisfy the requirements of the ACO, numerous individual exemptions under the Salem Zoning Ordinance (“Zoning Ordinance”) will be required. (Exh. USGenNE-1-1, at Section IV.B.2.ii); see *ComElec*

at 33. In order to build the Project in compliance with the ACO, USGenNE will, at a minimum, need exemptions from all of the following provisions of the Zoning Ordinance:

- Section 5-3(j) relating to nonconforming lots, structures, land and uses;
- Article VIII relating to nonconforming lots, structures, land and uses;
- Section 9-4 relating to special permits;
- Sections 4-1(2)(a) and (d) relating to the height and dimensional requirement of the Zoning Ordinance;
- the requirements of Table II of Article VI; and
- Section 9-5 relating to variances.

(Exh. USGenNE-1, at 6). At this time, USGenNE knows of no other exemptions that will be needed for the Project.¹⁰ However, given the complexity of this Project, the possibility remains that the Project will evolve during the permitting or construction process such that further zoning exemptions will be required. (Exh. USGenNE-JJC). As an example of the Project's evolving nature, USGenNE now believes that the Project no longer requires an exemption from Section 7-4 of the Zoning Ordinance relating to off-street loading, as was originally requested in the Petition. (Exh. USGenNE-1, at 6; Exh. DTE-3-3).

The Project will, however, require the exemptions from the Zoning Ordinance discussed below:

- a. **The Project will require an exemption from the special permit requirement for the alteration, reconstruction, change, enlargement, extension or expansion of nonconforming structures and uses.**

Pursuant to the Zoning Ordinance, which lacks any permitted use category for electrical generating facilities, Salem Harbor is considered a lawfully existing nonconforming structure, and its generation of power is considered a lawfully nonconforming use. (Exh. USGenNE-1, at 7; Tr. 54-55). According to Section 5-3(j), Article VIII and Section 9-4 of the Zoning

¹⁰As part of its Petition, USGenNE requested the Department's deferral of consideration of exemption from Section 7-18 relating to Site Plan Review. (Exh. USGenNE-1, at 6).

Ordinance, lawfully existing nonconforming structures and uses may not be altered, constructed, changed, enlarged, extended or expanded unless a special permit is granted by the City of Salem Zoning Board of Appeals (the "Board of Appeals"). (Exh. USGenNE-1). The Project will arguably result in the alteration, reconstruction, change, enlargement, extension and/or expansion of both the nonconforming structures and the nonconforming use of the structures and land at Salem Harbor. (Exh. USGenNE-1, at 7). Absent an exemption, USGenNE would need to apply for and obtain a special permit to construct the Project. *Id.*

Since the ACO implementation schedule (the "ACO Schedule") provides only five months to complete the zoning relief process, undergoing special permit proceedings would be a substantial impediment to the completion of the Project. (Exh. USGenNE-1-1, at Exhibit B). The special permit procedure can be lengthy and subject to potential delays and uncertainty. For example, the process for obtaining a special permit from the Board of Appeals can take up to 169 days after submission of the special permit application. (Exh. USGenNE-1-4 and 5). Moreover, the grant of a special permit is subject to appeal within 90 days after issuance, subjecting the process to even further delays. In sum, it could take almost six months for USGenNE to obtain a special permit, and it could take almost nine months before USGenNE could rely on such a permit with the certainty that it could no longer be challenged. If an appeal were to occur within the requisite timeframe, the matter would go to the Land Court, Superior Court, Housing Court or District Court. In such a case, USGenNE's ability to commence the Project would be subject to the uncertainty and delays of the court system. In effect, an appeal would virtually assure that construction of the Project could not be commenced on receipt of funding from the ISO. An exemption from the Special Permit Requirement of the Zoning Ordinance is therefore critical for timely completion of the Project.

b. The Project will require a variance from the Zoning Ordinance's height and dimensional requirements (Section 4-1(2)(a) and (d), Table II of Article VI, and Section 9-5 of the Zoning Ordinance).

Certain emissions control equipment, structures, and internal roadways to be constructed in connection with the Project will require numerous variances from height and dimensional requirements of the Zoning Ordinance. (Exh. DTE-3-1). For example, the Project will include nine structures that will exceed the Zoning Ordinance's limit of 45 feet. *Id.* Moreover, the Project will not conform to the Zoning Ordinance's front yard depth, side yard depth, or rear yard depth requirements. (Exh. DTE-3-2).

USGenNE will need to request a variance for any building or structure that exceeds the height or dimensional limitations of the Zoning Ordinance. (USGenNE-1-3). Obtaining a variance is a lengthy and complicated process, and in USGenNE's case could reasonably be expected to delay construction of the Project well beyond the timeframe set forth in the ACO Schedule. For example, the process for obtaining a variance from the Board of Appeals can take up to 114 days from the submittal of the variance petition. (Exh. USGenNE-1-6 and 7). If the grant of a variance were to be appealed during the 90 day appeal period, USGenNE would be subject to proceedings in the Land Court, Superior Court, Housing Court or District Court. At that point, USGenNE's ability to commence the Project would be subject to the uncertainty and delays of the court system. As with the special permit, an appeal of the variance would assure that construction of the Project could not be commenced on receipt of funding from the ISO.

2. A Delay in the Construction of the Project will have Numerous Adverse Consequences.

Under the terms of the ACO, each of the Salem Harbor Units can continue to operate for a certain duration without the installation of the Project, so long as each generating unit is deemed needed by ISO. (Exh. USGenNE-1-1 at Section IV.C). However, if the Company is

unable to install the ECP equipment as planned, the Company will have to comply with the 7.29 Regulations using the Compliance Account¹¹ rather than providing on-site, contemporaneous emission reductions. (Exh. USGenNE-1-1, at Section IV.B.3.a). Thus, a delay in the construction of the Project would alter, and potentially delay, the public benefit associated with the emissions reductions that would be achieved if the Project went forward expeditiously. Moreover, given inflation and other factors, delays in construction could increase the amount of funding required from the ISO. (Tr. at 133).

3. A Comprehensive Zoning Exemption is Appropriate in this Case.

- a. Without comprehensive zoning relief, possible further zoning relief required by the Project would result in a delay in the Project, and a deferral of the public benefit of lower emissions.**

Comprehensive zoning relief will be necessary to avoid possible delays both in the construction of the Project, and in the resulting benefits to the public associated with the earlier achievement of lower emissions. *See MassElectric* at 30-31; *ComElec* at 33 (Department allowed comprehensive zoning relief for construction of substation to prevent possible electrical power shortage during impending summer months). As set forth above, USGenNE has identified numerous individual exemptions from the Zoning Ordinance that are required for the Project. However, given the Project's complexity, it is virtually impossible at this time to confirm that no other exemptions will be necessary. (Exh. DTE-3-3). In the event further exemptions are needed, USGenNE would be forced either to initiate the local proceedings necessary under the Zoning Ordinance, or seek additional exemptions from the Department in subsequent DTE proceedings under Mass. Gen. L. c. 40A, § 3. As noted above, compliance with

¹¹ The Compliance Account is defined in Section IV.B.3.a of the ACO. (Exh. USGenNE-1-1 at 6). Beginning October 1, 2005, each pound of NO_x and SO₂ emitted from each of the Salem Harbor Units in excess of the applicable emissions rates under 310 CMR 7.29 will be added to the Compliance Account until the date on which the Salem Harbor Units achieve compliance with such emission rates.

special permit and variance proceedings, in addition to the possibility of appeals, may well delay the commencement of the Project beyond the schedule contemplated under the ACO. (Exh. USGenNE-1-1, at Exhibit B). As a consequence of this delay, these additional steps could also delay the Project's completion and thus defer the Project's emissions improvements.

b. Receipt of a timely comprehensive exemption will minimize delay of final design work.

Receipt of the comprehensive zoning exemption sought here will remove the risk that the zoning approval process will impose additional design changes on the Project. Were the Project subject to local zoning requirements, the final, detailed design work on the Project would have to be held in abeyance until USGenNE knew the final dimension and other requirements which could be imposed as permit conditions. With a timely comprehensive exemption, detailed design work can begin. While completion of final design work is also contingent on receipt of funding from ISO, receipt of a comprehensive exemption would allow final design work to commence now and be completed as soon as funding is received from ISO.¹² Absent a comprehensive exemption, it is possible that funding from ISO could become available well before the final design work had started due to zoning approval uncertainty. A comprehensive exemption would avoid such a delay.

c. There is a time-sensitive need for the Project for compliance with the ACO and the 7.29 regulations.

A comprehensive exemption is appropriate here because there is a time-sensitive need for the Project to ensure compliance with the ACO and the 7.29 Regulations. *MassElectric* at 30-31;

¹² In terms of the timeframe for funding from ISO, the Company currently estimates that ISO funding will be received by July 1, 2004. (Tr. at 80). However, the Company expects that under the terms of the RMR Agreement now under negotiation, access to that funding will be contingent on the Commonwealth of Massachusetts providing notice that the Project can proceed. (Tr. at 133). After that notice is provided, ISO will begin to establish an escrow account from which funds can be drawn. *Id.* Construction is expected to commence "a short interval after that as folks come on-site and get mobilized" (Tr. at 81) assuming all necessary permits have been received. (Tr. at 133). The period for mobilization was estimated as "a few months." (Tr. at 81).

ComElec, at 33. USGenNE is obligated to comply with the aggressive schedule for bringing Salem Harbor into compliance with the 7.29 Regulations within the timeframe required by the ACO. (Exh. USGenNE-1-1). Without a comprehensive exemption, and in the event that further zoning relief is needed, there is no guarantee that the Project will be constructed consistent with the schedule contemplated in the ACO. *See ComElec* at 33-34 (petitioner receiving blanket exemption demonstrated time-sensitive need for proposed substation to comply with company's supply and distribution guidelines). Moreover, a delay in the construction of the Project that would be the inevitable result of additional proceedings before the Zoning Board of Appeals would also defer the benefit to the public of the decreased emissions associated with the Project. *See MassElectric* at 30-31. In sum, time is of the essence for this Project due to the aggressive timeframes of the ACO Schedule. A comprehensive exemption is therefore necessary both for compliance with the ACO Schedule, and for the benefit to the public of achieving on-site emissions reductions as soon as possible.

d. A comprehensive exemption is warranted by public convenience and necessity, and it is critical to the public interest that construction begin without needless delay.

Finally, through the ACO, the Commonwealth has expressly deemed the Project and UNGenNE's compliance with the 7.29 Regulations a public necessity for the reduction of emissions from the Salem Harbor Units. (Exh. USGenNE-1-1, Section II.Q. and R.). It is difficult to imagine a more explicit finding of public necessity than the ACO, which confirms the Commonwealth's interest in lower emissions from Salem Harbor. A denial of a comprehensive exemption could frustrate the interest of the Commonwealth should delays in both the implementation of the ECP and reductions in air emissions occur. As it is critical to the interest of the Commonwealth that construction of the Project proceed without needless delay, the Project merits a comprehensive exemption from the Zoning Ordinance. *See ComElec* at 34.

4. USGenNE's Request For a Stay of Exemption from Site Plan Review Reflects a Commitment to the City's Interests.

Although USGenNE is requesting a comprehensive exemption from the Zoning Ordinance, USGenNE nonetheless chose to request a deferral of the Department's consideration of an exemption from the Site Plan Approval process of Section 7-18 of the Zoning Ordinance ("Section 7-18").¹³ This decision was made to ensure, by compliance with the Site Plan Review requirements, the minimization of Project impacts on Salem Harbor's immediate neighbors and on the City as a whole. (Exh. NEP-1-1). USGenNE has worked closely with the City in order to satisfy the Site Plan Review requirements, and to obtain Planning Board approval, within the compliance timeframes set forth in the ACO. The Site Plan Review was subject to careful and substantial public input, and proceeded as follows: USGenNE filed its application for Site Plan Review with the Planning Board on August 28, 2003. Seven public hearings were held on September 18, 2003 (*see* Exh. USGenNE-6), October 2, 2003 (*see* Exh. USGenNE-7), October 16, 2003, November 6, 2003, November 20, 2003, December 4, 2003, and December 18, 2003. On December 18, 2003, the Planning Board, in a 9-0 vote, unanimously approved Salem Harbor's proposed Site Plan. (Exh. USGenNE-8). The Planning Board filed its decision (the "Site Plan Approval") with the City Clerk on December 23, 2003. (Exh. NEP 1-1). The appeal period for the Site Plan Approval expired on January 13, 2004. (Exh. USGenNE-8, at 7).¹⁴

Under the Site Plan Approval, the Project must comply with certain conditions that reduce the impact of the Project on the surrounding community, including:

¹³ The Company's Motion to Defer Consideration of Its Request for Exemption from the Site Plan Review was granted by the Department. (Tr. at 4).

¹⁴ No appeals were filed. (Exh. NEP-1-1 (Supp.1)).

- all construction work will occur between the hours of 8:00 am and 5:00 pm on weekdays and Saturdays, while all blasting or pile driving work is prohibited on the weekends;
- all construction vehicles and equipment will be cleaned prior to leaving the site;
- any revisions from the proposed construction practices will be submitted and approved by the Planning Board;
- all abutters within 300 feet of the site will be notified in writing at least 72 hours prior to commencement of construction of the project;
- the Company will provide reasonable construction traffic mitigation measures as directed by the Department of Planning and Community Development;
- the Company will provide police detail at the intersection of Derby Street and Webb Street during all phases of construction unless otherwise allowed by the Department of Planning and Community Development;
- construction traffic will follow designated truck routes as approved by the Planning Board;
- the Company will provide snow emergency parking on a designated lot within the facility site for the surrounding neighborhood during the construction of the Project;
- the Company will pay a total of \$1,000,000 in impact fees to the City of Salem;
- the Company will submit a report to the Department of Planning and Community Development on the feasibility of removing or lowering three non-functional stacks currently on site in response to the Board's concerns about the visual impact of these stacks on the City;
- large equipment and ductwork will be brought by barge to the construction site; and
- the Company will re-pave lower Webb Street and the intersection of Webb Street/Derby Street after construction is complete.

(Exh. USGenNE-8).

Finally, in granting a comprehensive exemption in this case, the Department can rest assured that significant local control has been exercised over the details of the Project. *See Tennessee Gas* at 12 (comprehensive exemption must warrant Department's intrusion on local zoning authority). As an initial matter, the Mayor of the City of Salem, Stanley Usovicz, testified that the development of the ACO was a result of "years of debate and months of negotiation that forged a compromise" that included not only the Department of Environmental Protection ("DEP") and representatives of USGenNE, but also City residents. *See Transcript of Public Hearing concerning USGen New England Salem Harbor Power Station*, October 17, 2003, Volume A, at 10, 11. Moreover, the Site Plan Approval, issued by unanimous agreement

of the Planning Board, was the result of months of discussions between USGenNE and City officials, and was shaped by the community's input during the public hearings.¹⁵ The Site Plan Approval -- unlike the dimensional and structural issues regulated by the special permit and variance ordinances triggered by the Project -- -- pertains to conditions that will directly protect and promote the community's immediate safety and convenience. In short, the City's active involvement in shaping the ECP Project in both the ACO and the Site Plan Approval processes demonstrates the extent to which local concerns with the Project have already been vetted and addressed. *See Tennessee Gas* at 12.

C. **THE PROPOSED PROJECT IS REASONABLY NECESSARY FOR THE CONVENIENCE AND WELFARE OF THE PUBLIC.**

In determining whether a proposed use is reasonably necessary for the convenience and welfare of the public, the Department "must balance the interests of the general public against the local interest." *Nextel* at 7; *Town of Truro v. Dep't of Public Utilities*, 365 Mass. 407 (1974). The Department undertakes a "broad and balanced consideration of all aspects of the general public interest..." *New York Central Railroad v. Dep't of Public Utilities*, 347 Mass. 586, 592 (1964), examining the effects of the requested exemption "in the state as a whole and upon the territory served by the applicant." *Save the Bay*, 366 Mass. at 685; *New York Central Railroad*, 347 Mass. at 592. In particular, the Department examines: (1) the present or proposed use and any alternatives or alternative sites identified; (2) the need for, or public benefits of, the present or proposed use; and (3) the environmental impacts or any other impacts of the present or proposed use. *Nextel* at 8; *Berkshire Power* at 19.

¹⁵ Indeed, the Mayor indicated that the City was pleased to work with USGenNE on "zoning issues" concerning the Project. *See id.* at 11.

The Project will provide undeniable public benefits with minimal environmental impacts, and will benefit the residents of Salem, the North Shore region, and the Commonwealth as a whole. The Department can easily balance general and statewide interests with the local interest in this case, because all of these interests align in favor of the emissions reductions and continued operation of the Station that will result from the Project.

Through the Project, the requirements of the 7.29 Regulations, the ACO, and ISO's directive to keep the Station in operation will all be met, and in addition, the important public purpose of reducing air emissions in the Commonwealth will be served. As described in more detail below, the public benefits of the project far outweigh its impacts, and it is clear that the Project serves the public "convenience or welfare" and warrants a zoning exemption.

1. The Environmental Benefits of the Project Far Outweigh its Impacts.

a. The Project as proposed will produce significant reductions in NO_x, SO₂ and greenhouse gases.

The most significant public and environmental benefit of the Project is the resulting reduction in air emissions from the Station. As explained in detail in the Environmental Impact Statement ("EIS") submitted with the Petition, NO_x emissions will be reduced by more than 2,700 tons per year and SO₂ emissions will be reduced by more than 8,000 tons per year. (Exh. USGenNE-1-2, at 2-1). Significantly, the Project will accomplish these reductions while preserving a portion of the Commonwealth's fuel diversity by allowing continued operation of one of New England's few remaining coal-fired generating facilities. *See* Exh. USGenNE-4, at 29-30.

The Project will also reduce overall greenhouse gas emissions. (Tr. 63-64, 131). For example, the Project's Ash Recycling Process will provide a source of pozzolan ash that can be used as a cement substitute in the concrete manufacturing process. (Exh. DTE-1-7). This

substitute will reduce CO₂ emissions that would ordinarily be produced during the manufacture of concrete. (Tr. 63-64). In addition, the removal of the existing Selective Non-Catalytic Reduction ("SNCR") systems from Salem Harbor Units 1, 2, and 3 will result in net reductions of N₂O, another greenhouse gas. (Tr. at 131). Although DEP has not yet promulgated regulations defining which type of greenhouse gas reductions will qualify as CO₂ offsets, it is the Company's expectation that the reductions described above will, in fact, qualify as offsets under DEP's final CO₂ regulations. (Tr. at 64). Regardless of whether they ultimately qualify as offsets, however, the net reductions of N₂O and CO₂ produced by the Project will nonetheless be beneficial to the environment. *Id.*

Although the Project will result in net increases of certain categories of emissions, the increases will be negligible. Ammonia slip from the Project will be minimal, just 2 parts per million (ppm) from the new Selective Catalytic Reduction ("SCR") for Units 1, 2, and 3; and 10 ppm from the new SNCR for Unit 4. (Exh. USGenNE-1-2, at 2-4; Exh. USGenNE-RR-5). These limits are sufficiently low to ensure that no detectable ammonia odor will occur at ground level. (Exh. USGenNE-1-2, at 2-4). The Project may also result in a net increase in CO (about 20 ppm) due to decomposition of urea in the new SNCR. (Tr. at 115; USGenNE-RR-5). The only known technology for controlling such CO emissions, an oxidation catalyst, was considered and was deemed technically infeasible. (Exh. USGenNE-RR-5). The Station will therefore control CO emissions through good combustion practices to maintain optimum efficiency. *Id.*

In summary, the reductions in air emissions from the Project will be significantly greater than the net increases, and will therefore provide significant net benefits.

- b. Although an alternative allowed under the ACO is being studied, all of the proposed Compliance Equipment is still viewed as necessary to assure compliance.**

The ECP Project as proposed in this docket was approved by DEP under the terms of the ACO. *See* Exh. USGenNE-1-1, Exhibit D. Exhibit D of the ACO sets forth the "Pollution Control Measures" with which Salem Harbor can comply with the emission reductions for NO_x and SO₂ under the 7.29 regulations, consistent with the terms of the ACO. *Id.* Consequently, USGenNE is required to implement the ACO using the Pollution Control Measures listed in Exhibit D.

One of the measures included in Exhibit D for all four Salem Harbor Units is "Management of Lower Sulfur Fuels."¹⁶ *Id.* In an effort to determine if the use of lower sulfur coals could minimize capital costs of the Project, the Company has been conducting tests of an array of lower sulfur coals. (Exh. DTE 1-8; Tr. at 71-72). The target date for completion of testing is March 31, 2004. (Exh. DTE 1-8; Tr. at 72). If the Company concludes that the use of lower sulfur coals is feasible, and that compliance can be maintained without the use of the Flue Gas Desulfurization unit and supporting ancillary structures, the footprint of the project would be slightly reduced. (Exh. DTE 1-8; Exh. DTE 1-8-1(Drawing SK-1007-1); Tr. at 72). However, in that event, the Company does not plan to reconfigure the balance of the required equipment for two reasons. First, relocation of equipment would require refiling for modifications to permits and approvals already received or in process. (Tr. at 73). To do so would be inconsistent with USGenNE's obligation under the ACO to seek all necessary approvals as expeditiously as possible. Second, the Company would like to maintain the current arrangement to allow room

¹⁶ Under Section IV.A.1 of the ACO, USGenNE is already using lower sulfur oil in Unit 4 "to achieve early compliance with the SO₂ emission requirements of the 7.29 regulations by emitting not more than 6 lbs/MWH on a rolling twelve-month average basis." (Exhibit USGenNE-1-1).

for installation of a scrubber vessel in the future if it were needed. (Tr. at 74). Therefore, although it is conceivable that the lower sulfur coal alternative may be implemented for Units 1, 2 and 3, thereby eliminating the need for the Flue Gas Desulfurization unit and ancillary equipment, the Company currently intends to construct the entire project as proposed.

c. Water

Additional water supply is needed to operate the Project, principally for the Flue Gas Desulfurization unit. (Tr. at 120). USGenNE expects to use treated effluent from South Essex Sewerage District ("SESD") for its water process needs, minimizing the Project's impact on the City's potable water supplies. (Exh. USGenNE-1-2, at 2-9). USGenNE will construct water storage tanks and a small treatment facility on its own property as part of this interconnect to SESD. (Exh. DTE-1-6).

d. Noise

There will be no significant adverse noise impacts from the Project, either during construction or operation, and USGenNE will implement several mitigation measures to ensure that the Project minimizes to the extent practical any disruption to the community, including but not limited to nearby residences and the Bentley School. *See* Exh. USGenNE-8, at ¶¶ 16,17; Exh. USGenNE-9; Tr. at 50-51.

i. Construction period

Extensive noise modeling was conducted as part of the environmental review of the Project. The modeling included baseline measurement of current conditions and use of sound level data for the various types of construction vehicles and equipment likely to be used for the Project. (Exh. USGenNE-1-2, at 2-18 to 2-19). USGenNE's noise studies concluded that construction-related sound levels will be near, or below, existing ambient daytime noise levels at all seven modeled locations. *Id.* at Table 9. Some locations may experience a small, short-term

noise increase when certain construction equipment is in operation. *Id.* at 2-19. However, no adverse long-term impacts are expected. *Id.* It should be noted that the predicted sound level increases shown in the EIS submitted in this docket for the Project are those experienced by people outdoors, and a building would provide significant attenuation of noise levels. *Id.* at 2-20.

The construction of the Project is subject to the Site Plan Approval of the Salem Planning Board, issued December 18, 2003. (Exh. USGenNE-8). In the Site Plan Approval, the Planning Board imposed numerous conditions on construction hours, traffic, and noise. *See id.* at ¶¶ 8, 10, 16, 17; Tr. at 44-46, 50-52. For instance, USGenNE is required to mitigate noise impacts from pile driving by using augering or “pin-piling,” both of which involve advancing piles into the ground with drilling equipment, rather than impact driving. (Exh. USGenNE-8, at ¶ 16; Exh. USGenNE-9; Tr. at 50). Noise associated with these forms of pile installation is mainly from the diesel engine that powers the drill rig, and there is no repetitive banging on the top of the pile, as with standard pile driving. (Exh. USGenNE-9). As indicated in a memorandum by TRC Environmental Corporation dated December 17, 2003 that analyzes these methods, the pile installation will not interfere with instructional activities at the Bentley School, where the indoor noise level will remain below 35 dBA. *Id.*; Tr. at 51. As the memo concluded, “noise levels would be in the same range as they are today, and no noticeable incremental noise impacts would be expected at the Bentley school....” (Exh. USGenNE-9). Conventional pile-driving techniques will be used, however, for the sheet piles needed for crane support. (Exh. USGenNE-8, at ¶16).

Consistent with City of Salem Ordinances and the Planning Board approval, construction will be limited to daytime hours on weekdays and Saturdays, to minimize impacts on nearby

residences. (Exh. USGenNE-8, at ¶ 8; Exh. DTE-1-21; Tr. at 44-45). Any change in these hours would require a special variance to be granted by the Building Inspector with the approval of the City Council. (Exh. USGenNE-1-3 (Article 1, Section 22-2(5)); Exh. USGenNE-8, at § 8a).

Under the Site Plan Approval, USGenNE must take all reasonable actions to minimize noise impacts on abutters, and the noise generated during construction must be in accordance with the Environmental Impact Statement. (Exh. USGenNE-8, at ¶ 1, 8). Advance written notice of the commencement of construction must be provided to abutters living within 300 feet of the site. *Id.* at ¶ 9.

At the end of the construction period, the Project will undergo a commissioning period involving testing to ensure compatibility with the Station and proper operation. (Tr. at 75). The Project components will likely operate less than 24 hours a day at the beginning of this period, and then are expected to operate 24 hours a day toward the end of the period -- the same hours of operation as the Station. (Tr. at 76-77). Noise levels are expected to be the same, or possibly lower, during commissioning, compared to when the Project is fully operational. (Tr. at 102-103).

ii. Operation

The noise impacts from operation of the Project will be even less than from construction. The noise from Project operation will principally be from the new fans and blowers installed for the Project. (Exh. USGenNE-1-2, at 2-16). The noise modeling conducted for USGenNE was based on mitigation measures that USGenNE will install for the Project, such as fan discharge silencers and enclosures on numerous fans, boilers, and pumps. *Id.* As detailed in the EIS, the noise studies concluded that at the seven locations modeled, the increase in noise levels due to Project operation will be 3 dBA or less over the measured baseline ambient conditions. *Id.* at Table 6. A 3 dBA noise increase is widely considered by noise experts and regulators to be

imperceptible. *Id.* at 2-15. Even near the closest residences along Fort Avenue, there are not expected to be any adverse noise impacts from Project operation. *Id.* at Table 6; Exh. DTE-1-18.

e. Traffic

All construction traffic will follow a pre-assigned route, down Bridge Street, onto lower Webb Street, and through the Webb Street Gate, as outlined in the Traffic Management Plan. (Exh. DTE-1-26; Exh. USGenNE-8, at ¶ 10; Tr. at 47). This route was selected to minimize traffic disruptions and traffic noise impacts on nearby residences. (Exh. DTE-1-26). The Webb Street Gate was selected to provide quicker and more direct access to the Project site than the existing main Station gate on Fort Avenue. *Id.* In addition, USGenNE is required by the Planning Board to provide a police detail at the Derby Street/Webb Street intersection and at other intersections, if necessary. (Exh. USGenNE-8, at ¶ 10; Tr. at 46-47). The police detail at the Derby Street/Webb Street intersection cannot be removed except with approval of the Department of Planning and Community Development. (Exh. USGenNE-8, at ¶ 10).

Table 2 of the Traffic Management Plan provides a projection of the approximate number of workers on-site and the number of truck trips on a month-by-month basis during construction. (Exh. DTE-1-26-1, Table 2). As shown in this Table, the construction truck trips are concentrated during the first two months of construction when site preparation work is underway, and then during months eight through twelve during concrete pours. *Id.* As required by the Site Plan Approval, all construction vehicles and equipment will be cleaned prior to leaving the site to avoid leaving dirt or debris on surrounding roadways. (Exh. USGenNE-8, at ¶ 8).

To further mitigate construction traffic impacts, USGenNE intends to bring the largest pieces of equipment to the site by barge. (Exh. DTE-1-26 (Supp. 1); Exh. USGenNE-8, at ¶ 14; Tr. at 49). Large assemblies for the SCR, the spray dry absorber, and the baghouse, as well as

major ductwork, are all planned to be brought by barge, avoiding transportation of these large pieces of equipment through the streets of the City. (Tr. at 49, 88).

There are no anticipated parking impacts from construction because all construction traffic will enter the Project area and will not be permitted to park or idle on City streets. (Exh. DTE-1-26). Under the Site Plan Approval, all construction vehicles and equipment left on the Station property overnight must be located completely on the site. (Exh. USGenNE-8, at ¶ 10). USGenNE will work closely with the Salem Police and the Planning Board during construction to ensure that construction traffic runs smoothly. (Exh. DTE-1-26). It will also discuss further traffic mitigation measures with the Salem Department of Planning and Community Development for those intersections and roadways most directly affected by the construction traffic. (Exh. USGenNE-8, at ¶10).

Traffic from operation of the Project will be a minimal increase over current traffic from Station operation. As the EIS explains, the Project will result in an increase of approximately 15 trucks per day, for purposes such as lime and urea delivery, and removal of spent reagent and processed fly ash. (Exh. USGenNE-1-2, at 4-3).

f. Visual

USGenNE conducted extensive visual simulations of the Project components from twelve different vantage points. *See* Exh. DTE-1-11-1A and B through 12A and B. The simulations demonstrate that there will be no significant adverse visual impacts from the Project. The Project components are of similar material, color, and scale as the existing Station building, and the components are smaller than the existing Station buildings and stacks, which are predominant visual features of the Station property. (Exh. USGenNE-1-2, at 3-2). Landscaping, intervening

structures, and a stockade fence along Fort Avenue will all help to obscure the Project from residences to the west. (Exh. DTE-1-11-1A and B through 12A and B; Tr. at 124-125).

In addition, the Site Plan Approval mandates that USGenNE conduct a feasibility study for removal of the three existing stacks that are not in use at the Station. (Exh. USGenNE-8, at ¶ 13; Tr. at 49, 57-58). If dismantling these stacks proves feasible, the visual impact of the Station as it now exists would be diminished.¹⁷

2. **Salem Harbor Will Provide a Reliable Source of Power to the ISO to Serve the North Shore and Greater Boston.**

In addition to significant reductions in air emissions, the Project will also benefit the public by allowing the Station to continue operating. As discussed in detail in Section II.A.3. above, ISO has concluded that the retirement of the Salem Harbor Units would have “a significant adverse affect on the reliability of the NEPOOL System” as a whole and on the North Shore load area in particular. *See* Exh. USGenNE-1-13 and 14. The need for Salem Harbor is now particularly acute because of ISO’s November 2003 decision to approve the retirement of Mystic Generating Units 4-6 based in part on the assumption that Salem Harbor would remain operational as long as necessary to ensure the reliability of the NEPOOL system. (Exh. USGenNE-PCS, at 2; Exh. USGenNE-PCS-3). As ISO put it, electric reliability in the North Shore and the Boston import area would be “untenable” if Salem Harbor were to be retired. (Exh. USGenNE-4, at 29). In short, there is clear evidence that the continued operation of Salem Harbor, which will be facilitated by the Project, is essential for electric reliability and therefore contributes to the public welfare and convenience.

¹⁷ The potential demolition of the three decommissioned stacks is not part of the ECP Project but is mentioned here because of its inclusion by the Planning Board in its Site Plan Approval.

3. Construction of the Project Can Proceed Without Interfering With Transmission Projects of New England Power.

USGenNE has demonstrated that it can construct the Project without interfering with the existing cables owned by New England Power ("NEP") on the facility's property or NEP's planned transmission projects. (Tr. at 86). Engineers from USGenNE and NEP have met several times to discuss and coordinate installation locations. (Exh. NEP-1-6). The consensus of the engineers was that a westerly route for the cable trenches, (*see* drawings attached to Exh. NEP-1-5), is the best route for safeguarding existing equipment. *Id.* This route will also allow NEP to construct its Automation Project in the eastern portion of the switchyard. Prior to the detailed design of the proposed 115 kV cable trenches, USGenNE will work with NEP to determine the exact location and depth of its existing buried cables and ductbanks. (Exh. NEP-1-6).

As indicated on Drawing SPS-1003 Rev B., included with Exh. NEP-1-4, the gas metering station to be constructed does not encroach upon the NEP transmission easement. (Exh. NEP-1-4). The gas pipeline from the metering station will be a six inch diameter steel or plastic pipe that will be buried approximately two feet below grade. (Exh. NEP-1-3; Tr. at 82). USGenNE will work closely with NEP to ensure that the gas pipeline does not interfere with existing cables or ductwork in the transmission easement, in the short stretch of the pipeline that will cross the easement. (Exh. NEP-1-3). Provisions can be made to ensure that there is no interference, even if the gas pipeline is buried less than the usual two feet below surface. (Tr. at 82).

Notably, NEP did not introduce *any* evidence that the cables and gas pipeline needed for the Project will interfere with NEP's existing equipment or planned transmission upgrades. There is ample space to accommodate USGenNE's gas pipeline and 115 kV trenches and NEP's existing and new equipment, and USGenNE is committed to working closely with NEP to

coordinate the installation consistent with the terms of the Continuing Site Agreement. (Exh. NEP-1-3; Exh. NEP-1-6). Therefore, NEP is not a "local interest" that will be adversely impacted by the Project. The Department should determine that the general interest in this Project is substantial and that the Project is necessary for the convenience or welfare of the public.

III. CONCLUSION

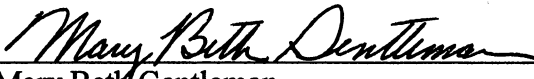
USGenNE has demonstrated that it is a public service corporation, that it requires a comprehensive exemption from the Zoning Ordinance of the City of Salem to construct and operate the Project, and that the Project is necessary for the convenience and welfare of the public. The Project serves an important public purpose of substantially reducing air emissions while enabling the Station to continue to provide electricity and meet reliability needs. The benefits of the Project for the public vastly outweigh the minimal impacts that may accompany its construction and operation. The Department should therefore grant the requested comprehensive zoning exemption under Mass. Gen. L. c. 40A, § 3 while continuing to defer

consideration of the Company's request for an exemption from Section 7-18 of the Salem Zoning Ordinance.

Respectfully submitted,

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